Inasmuch as in this case it was generally considered that the affidavit was totally unnecessary and the documents which it exhibited were referred to in the statement of claim and were therefore available to the court, this may perhaps not be so clear an authority. With respect, perhaps a clearer authority is *Willis* v. *Earl Howe*.[2] But the practice is clear. In an application under O.25 r.4 only the statement of claim could be looked at but under the inherent jurisdiction of the court, affidavit evidence may be received.

The affidavits reveal, if I may so summarise the statements contained therein, the desirability and perhaps the need for retaining the plaintiffs' moneys in the companies for the viability of the companies, since the companies operate on overdraft facilities from certain banks, but in my view unless it is established that there is a contractual duty or an obligation binding at law on the plaintiffs to keep their moneys in the companies, there can be, it seems with respect to me, no valid reason why the plaintiffs should be deprived of their moneys. It may be, as the affidavits filed on behalf of the defendants aver, that apart from the need for liquidity, there is such an obligation from the trust that arose on the formation of the companies, but this with respect is a different thing from saying that the claim is vexatious or should be stayed in the inherent jurisdiction.

In the course of the arguments, an objection was taken, and if I may say so without respect, would seem to be well taken that no cause of action has been disclosed against the third defendant, since the first two defendants being registered companies were legal entities and could act for themselves through their officials without necessity of joining in their managing director or any officials personally. But in the objection that was in fact taken, no prayer was sought to strike out the third defendant. I think I should now await such an application before I so rule.

With respect to the application to sign final judgment, with respect, the figures, even when the amendment that was sought is allowed, do not as a matter of arithmetic come to the amounts judgment is asked for. Further amendments with perhaps additional information may be necessary to disclose these amounts, but in venturing this suggestion, I must not be taken to indicate that there has been shown no defence on the merits that would not call for a hearing.

In the result, the application for a stay is dismissed, as well as the application to sign final judgment. The fairest order on costs I could think of to fit the circumstances is that each party will bear its own costs.

In case it is desired to take these matters a stage beyond, I now certify that I require no further arguments.

Application dismissed.

Solicitors: *Lim Kean Siew & Co.; Allen & Gledhill.*

M.C. PERERA & ORS. v. N. PONNUSAMY & ORS.

[O.C.J. (Mohamed Azmi J.) December 24, 1973]
[Kuala Lumpur — Civil Suit No. 204 of 1973]

Practice and Procedure — R.S.C. 1957 — Order under O. 32 r. 6 — Condition in — Failure to comply with condition — Order therefore waived or abandoned under O. 42 r. 2.

The plaintiffs obtained an interim injunction restraining the defendants from proceeding with the annual general meeting of the branch of the political party to which all the parties to this action were members unless the plaintiffs and 176 others had been given notice of the meeting and were permitted to attend and vote thereat.

The defendants' application to set aside the interim injunction was dismissed as there was a serious question to be tried. The plaintiffs then applied for an order that the defendants be perpetually restrained from holding the meeting unless the plaintiffs and 176 others were given notice of the meeting and were permitted to attend and vote thereat.

The judge granted the order on condition that the plaintiffs filed the particulars of themselves and the 176 others within a time set by the judge. The plaintiffs failed to comply with this condition.

Held: the plaintiffs had failed to comply with the condition imposed by the order of court and by such failure the order had been waived or abandoned by the plaintiffs under R.S.C., O. 42 r. 2.

CIVIL SUIT.

S. A. Raj for applicants/defendants.

G. Vadiveloo for respondents/plaintiffs.

Mohamed Azmi J.: This is an appeal against my decision made on December 24, 1973 wherein I held that the plaintiffs had failed to comply with the conditional order made in their favour dated October 10, 1973.

This case involves a dispute between members of the Semenyih Branch of the Malaysian Indian Congress. The facts leading to the present appeal are as follows. By *ex-parte* summons-in-chambers, the plaintiffs obtained an interim injunction on March 2, 1973 restraining the defendants from proceeding with the annual general meeting of the Branch unless the plaintiffs and 176 others similarly affected had been given notice of the meeting and were permitted to attend and vote thereat. On March 10, the defendants filed a Notice of Motion to set aside the *ex-parte* order. The application was, however, dismissed on April 23. In dismissing the application, I held that there was a serious question to be tried at the proper hearing of the plaintiffs' claim which would affect not only the plaintiffs' right to participate at the annual general meeting but also the right of the other members who were alleged to be similarly affected. I also held that, if the interim injunction were set aside, then irreparable damage would be caused to the right of the plaintiffs and the other members of the political party. The interim order accordingly stands pending the proper hearing of the suit filed by the plaintiffs.

By Notice of Motion dated August 9, 1973, the plaintiffs applied for judgment and costs under Order 32 Rule 6 of the Rules of the Supreme Court, *i.e.* for an order that the defendants be perpetually restrained by injunction from proceeding with the annual general meeting of the Semenyih Branch unless the plaintiffs and 176 others similarly affected were given notice of the meeting and were permitted to attend and vote thereat. The application was based on the letter of the defendants' solicitors dated June 4, the relevant part of which reads as follows:

"With reference to the above matter our clients will be convening the Annual General Meeting in accordance with the order of court dated 17th February, 1973.

We shall therefore, be pleased if you will let us have the subscription for 1973 from your clients and the 176 members together with the list of the relevant members in order that the meeting can be convened in terms of the order."

In my view, the above letter is not merely an attempt to comply with the interim order but also an admission to judgment as far as the interim injunction is concerned. However, to enable the defendants to call the proposed annual general meeting and to comply with the interim order, which is merely prohibitory in nature, it is obviously necessary that they should be supplied with the names and particulars of the 176 other interested persons so that they could be served with the notice of the meeting and allowed to participate and vote in accordance with the Malaysian Indian Congress Constitution. Accordingly, on October 8, 1973 I made an order in favour of the plaintiffs under Order 32 Rule 6 of the Rules of the Supreme Court in terms of their Notice of Motion on condition that the particulars of the 176 persons are filed within one week from the date of the order.

By Notice of Motion dated October 22, 1973, the defendants made the present application for an order that the plaintiffs' application vide Notice of Motion dated August 9 be dismissed with costs on the ground that the order made by the court in favour of the plaintiffs was a conditional one and that the plaintiffs had failed to comply with the condition imposed. Mr. Vadiveloo for the plaintiffs conceded that the order was a conditional one but contended that the plaintiffs had complied with the condition. The issue in this case, therefore, was whether the plaintiffs had not complied with the condition imposed, *viz.* filing the particulars of the 176 persons within one week of October 8, 1973. The plaintiffs did serve the defendants with a list containing 176 names within the prescribed time. (See list annexed to affidavit of third plaintiff dated October 15, 1973). As stated earlier on, the purpose of the condition was to enable the defendants to serve the notice of the proposed meeting to the 176 affected persons whom the plaintiffs alleged should be given the right to participate and vote. Mr. Vadiveloo submitted that since the names of the 176 persons had been supplied to the defendants, they had thereby complied with the conditional order. It is true that the list supplied by the plaintiffs contained the names, N.R.I.C. numbers and membership numbers of the various persons, but the defendants alleged that the plaintiffs had merely conjectured the list. On this particular allegation, Mr. Vadiveloo conceded that one of the 176 names in the list was not genuine and that some of the membership numbers were incorrect. On that admission alone, how can it be said that the plaintiffs had complied with the conditional order? In my view, the particulars required to be filed by the plaintiffs should not only contain the correct names of the 176 persons but also their correct particulars, such as address and membership number. The plaintiffs' writ was filed on March 2, 1973, and it is inconceivable that as late as October they appeared to be in difficulty in securing the true particulars of the 176 persons whose right they alleged would be affected if the interim injunction had not been granted.

Under the circumstances, I hold that the plaintiffs had failed to comply with the condition imposed under the Order of Court dated October 8, 1973. By virtue of such failure, I direct that the conditional order had been waived or abandoned by the plaintiffs under Order 42 Rule 2 of the Rules of the Supreme Court. The consequence of this order would be that the proper hearing of the plaintiffs' claim should be heard on January 2, 1974 as already fixed.

Order accordingly.

Solicitors: *Dato Clough Thuraisingham, Raj & Co.; Xavier & Vadiveloo.*

N.Y.F. REALTY SDN. BHD. v. COMPTROLLER OF INLAND REVENUE

[A.C.A. (Sharma J.) February 20, 1974]
[Ipoh — Originating Motion No. 19 of 1971]

Income Tax — Purchase and resale of property — Whether taxpayers holding properties as investments or were trading — Criteria for distinguishing between taxable and non-taxable selling profits — Findings of facts — Questions of law — Failure of Special Commissioners to make finding on essential facts — Case remitted to Special Commissioners — Income Tax Act, 1967.

This was a case stated by the Special Commissioners and the only question was whether the appellants were holding their immovable properties as investments or were trading and/or carrying on a business of purchase and sale of lands. It appeared that there were certain essential facts on which the Special Commissioners had failed to give their findings.

Held: the case should be remitted to the Special Commissioners to make their findings on the essential facts.

Cases referred to:-

(1) *Farmer* v. *Cotton's Trustees* [1915] A.C. 922.

(2) *Ochberg* v. *Commissioner of Inland Revenue* (1931) 5 South African T.C. 93.

(3) *Commissioner of Taxation* v. *G's Estate* (1965) 27 South African T.C. 9.

ORIGINATING MOTION.

N. T. Rajah for the appellants.

Abdullah bin Ngah (Senior Federal Counsel) for the respondent.

Sharma J. (delivering oral judgment): This is a case stated by the Special Commissioners and the only question involved in this appeal is whether the appellants were holding their immovable properties as investments or were trading and/or carrying on a business of purchase and sale of lands they had acquired. Profits derived from the purchase and resale of property are not, *per se*, subject to income tax. While the Act does not specifically exempt capital gains or otherwise exclude such gains from income, the courts have held that the mere realisation of capital appreciation is not income under the ordinary concepts and usages of mankind. However, the Act (*i.e.* the Income Tax Act) does require that taxable income shall include: —

(1) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit making by sale; or